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## Articles

### Fullilove

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#### I. INTRODUCTION

In 1977, Congress enacted the Public Works Employment Act,<sup>1</sup> the first federal statute of general application containing an explicit racial classification. The Act, designed to pump four billion dollars of federal funds into a flagging economy, contained a provision which ensured that ten percent of that amount would be allocated to business enterprises owned by United States citizens who were "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."<sup>2</sup> Three years later, in *Fullilove v. Klutznick*,<sup>3</sup> the Supreme Court rejected a constitutional challenge to the Act by a vote of six to three.

Coming after the Court's decision in *Regents of the University of Cali-*

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1. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified in significant part at 42 U.S.C. §§ 6705(e)-6707(j) (1982)).

2. Pub. L. No. 95-28 § 103(f)(2), 91 Stat. 116, 117 (1977) (codified at 42 U.S.C. § 6705(f)(2) (1982)).

3. 448 U.S. 448 (1980).

*fornia v. Bakke*,<sup>4</sup> from which no clear constitutional standard could easily be derived,<sup>5</sup> *Fullilove* was widely regarded by proponents of affirmative action as an important and positive development. The *Fullilove* Court unequivocally upheld Congress' power to use race-conscious remedies in its effort to eradicate the effects of past and present racial discrimination and to prevent the recurrence of that discrimination. The Court directly repudiated claims that affirmative action was merely "reverse discrimination" and that the Constitution prohibits any governmental practices that violate the principle of color-blindness. Based upon *Fullilove*, state and lower federal courts have upheld a variety of affirmative action programs in education and employment<sup>6</sup> whose constitutionality had been unclear after the Supreme Court's earlier decisions in *Bakke* and *United Steelworkers of America v. Weber*.<sup>7</sup>

Since *Fullilove*, Congress has enacted other minority set-aside provisions<sup>8</sup> and federal agencies have adopted similar policies by regulation or practice.<sup>9</sup> Moreover, although the outcome in *Fullilove* turned upon the fact that the Court was reviewing an Act of Congress, the case has been viewed as authorization for the creation of non-federal minority set-asides. Consequently, over the past six years, states, state agencies, counties, municipalities, and municipal agencies have patterned programs after the Public Works Employment Act in an effort to benefit minority enterprises.<sup>10</sup>

4. 438 U.S. 265 (1978).

5. In *Bakke*, five Justices held that race might under some circumstances be a constitutionally permissible admissions criterion, but divided four to one on the rationale. The four remaining Justices did not address the constitutional question.

6. See, e.g., *Kromnick v. School Dist.*, 739 F.2d 894, 900-04 (3d Cir. 1984) (upholding teacher reassignment program); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983) (upholding voluntary affirmative action program adopted by police department), *cert. denied*, 464 U.S. 1040 (1984).

7. 443 U.S. 193 (1979). *Weber* upheld the legality, under Title VII of the 1964 Civil Rights Act, of a private, race-conscious craft-training program. See *infra* text accompanying notes 29-32.

8. Highway Improvement Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (1983); International Security and Development Assistance Authorizations Act of 1983, Pub. L. No. 98-151, 97 Stat. 964, 970-71 (1983) (amending Foreign Assistance Act of 1961, 22 U.S.C. § 2151 (1961)).

9. See, e.g., *Central Alabama Paving, Inc. v. James*, 499 F. Supp. 629 (M.D. Ala. 1980) (granting preliminary injunction restraining enforcement of Department of Transportation regulations designed to encourage participation by minority and women owned businesses in highway construction projects).

10. The following set-asides have been the subject of reported litigation:

(a) States: The Ohio minority business enterprise statute, OHIO REV. CODE ANN. § 123.151 (Anderson Supp. 1985), requires that approximately 5% of all construction contracts awarded each year be set aside for bidding solely by minority businesses. *Id.* § 123.151(C)(1). It also directs that non-minority contractors, to the extent that they subcontract, must award subcontracts totaling not less than 5% of the aggregate value of the contract to minority subcontractors. *Id.* § 123.151(C)(2)(a). The total value of subcontracts with and materials purchased from minority business enterprises must equal at least 7% of the aggregate value of the contract. *Id.* § 123.151(C)(2)(b). Under the Act, approximately 15% of the estimated total value of state contracts for insurance or for purchases of equipment, materials, or supplies must be selected and set aside for bidding solely by minority business enterprises. OHIO REV. CODE ANN. § 125.081(A) (Anderson 1984); see Ohio Contractors Ass'n

When I argued for the United States government in *Fullilove*, I believed that Congress acted within constitutional limits when it enacted the minority set-aside provision at issue there. This remains my belief. In my estimation, however, the six to three vote in favor of the provision does not reflect adequately the closeness of the constitutional question involved. At the same time, the majority's holding was clearly not unreasonable. As the government argued in defense of the set-aside, Congress had attempted for many years prior to the Public Works Employment Act to address the problems of minority business enterprises, as evident in hearings, committee reports, and actual legislation.<sup>11</sup> The government also argued that the

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v. Keip, 713 F.2d 167 (6th Cir. 1983).

Michigan's procurement policy sets interim and ultimate expenditure goals for purchases from minority and women owned businesses. MICH. COMP. LAWS ANN. § 450.772(2) (West Supp. 1986). The ultimate goals under the Michigan statute are 7% and 5% set-asides for minority and women owned businesses, respectively. *Id.* See Michigan Road Builders Ass'n v. Milliken, 571 F. Supp. 173 (E.D. Mich. 1983).

(b) State Agencies: A 30% minority set-aside requirement was imposed upon a specific Massachusetts construction contract. See *Perini Corp. v. Massachusetts Bay Transp. Auth.*, No. 77-2340-MC (D. Mass. Sept. 22, 1980). Similarly, a local Delaware transportation authority established a program in which general contractors were required to set aside 15% of the value of their public works contracts for minority entrepreneurs. *Pettinaro Construction Co. v. Delaware Auth. for Regional Transit*, 500 F. Supp. 559 (D. Del. 1980).

(c) Counties: Pursuant to a county ordinance, the Board of County Commissioners of Dade County, Florida opened bidding on a contract to black-owned contracting firms only, and resolved that 50% of the contract's value would be awarded to black subcontractors. See *South Fla. Chapter of the Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade County*, 723 F.2d 846, 861-62 (11th Cir.), *cert. denied*, 105 S. Ct. 220 (1984). Likewise, in Pierce County, Washington, an affirmative action plan for county public works projects required contractors to meet a goal of at least 12% minority business enterprise participation. See *Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wash. 2d 109, 111, 667 P.2d 1092, 1094 (1983). Women's business enterprises were also covered, but no specific goals were set for these entities. *Id.*, 667 P.2d at 1094. "Minority" was defined to include "blacks, Hispanics, Asian Americans, native North Americans, and any other group or individual 'found to be economically and socially disadvantaged . . .'" *Id.* at 112, 667 P.2d at 1094.

(d) Cities: A Birmingham, Alabama ordinance requires that all city construction contracts exceeding \$20,000 have as their goal a 15% set-aside for expenditures with bona fide minority business enterprise contractors, subcontractors, or suppliers of goods and services. See *Arrington v. Associated Gen. Contractors of Am.*, 403 So. 2d 893, 897 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982). A Richmond, Virginia minority set-aside plan required all contractors who were awarded construction contracts by the city to subcontract at least 30% of the contract value to minority business enterprises. See *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181, 182 (4th Cir. 1985), *vacated and remanded*, 106 S. Ct. 3327 (1986). Minority group members were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." 779 F.2d at 182 n.3. An Atlanta, Georgia city ordinance, while containing no fixed percentages, was implemented to ensure that 20% to 35% of municipal contracts would go to minority and female owned enterprises. Minorities were defined as Asian, Black, Hispanic, or Native American. See *Georgia Branch, Associated Gen. Contractors of Am. v. City of Atlanta*, 253 Ga. 397, 397-98, 321 S.E.2d 325, 326 (1984). A San Francisco ordinance sets aside 10% and 2% of the city's contract dollars for minority business and women's business enterprises, respectively. See *Associated Gen. Contractors v. City & County of San Francisco*, 619 F. Supp. 334, 335 (N.D. Cal. 1985).

(e) Municipal Agencies: An Oakland school district plan required bids for contracts over \$100,000 to contain a commitment to use minority owned businesses for at least 25% of the dollar amount of the total bid. See *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550, 553 (9th Cir. 1981), *vacated and remanded*, 457 U.S. 594 (1982).

11. Brief for the Secretary of Commerce at 34-43, *Fullilove v. Klutznick*, 448 U.S. 448 (1980)

fast-moving nature of the 1976 and 1977 public works programs justified the set-aside. Without some safeguard for minority businesses, the federal funding might have disappeared before corrective measures for discriminatory practices could be undertaken.<sup>12</sup> Finally, the government stressed the unique role of Congress in identifying and remedying racial discrimination under section 5 of the Fourteenth Amendment.<sup>13</sup> A majority of the Court found these arguments persuasive, as I will discuss below.<sup>14</sup>

To concede the constitutionality of Congress' actions in this regard, however, begins rather than ends the inquiry for me. I continue to be concerned both about the manner in which Congress enacted the Public Works Employment Act and about the arguments that the Supreme Court adduced to find the Act constitutional. Specifically, I find myself asking whether Congress and the Supreme Court, in enacting and approving the Public Works Employment Act, established standards for the formulation and judicial review of minority set-aside programs that, constitutionality aside, fall below those we ought to employ, given our justifiable national sensitivity to racial classifications. These concerns multiply at the prospect of the proliferation of minority set-aside programs at the state and local levels even though they, too, may be fully explicable and constitutionally permissible responses to patterns of discrimination against minority contractors.

I am not unmindful of the controversy that these questions may provoke. It may appear to some that either I have experienced a profound conversion or that I have now resolved to acknowledge my own hypocrisy in view of my past involvement in the defense of minority set-asides, and that my purpose here is to undermine the legal and political support minority set-asides still enjoy. As a friend remarked, the headlines after this Article's publication might read: "Respected Civil Rights Attorney Repudiates Minority Business Enterprise Set-Asides."

Let me state emphatically that nothing could be farther from my mind. I have written this Article because I am convinced that race-conscious remedies, such as minority set-asides, can be decisive instruments to correct America's pervasive legacy of discrimination. I am also convinced, however, that these remedies are unlikely to enjoy long-term success, measured in programmatic, legal, or social terms, unless they are properly designed and implemented. It is my hope that the questions I raise and the answers I offer will promote that long-term success.

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(No. 78-1007).

12. Brief for the Secretary of Commerce, *supra* note 11, at 42.

13. *Id.* at 19-26.

14. See *infra* text accompanying notes 55-73.

## II. INADEQUATE JUSTIFICATIONS FOR RACE-CONSCIOUS REMEDIES IN EDUCATION AND EMPLOYMENT

There are those who are unwilling to accept the notion that American institutions must under certain circumstances use race explicitly to remedy the effects of past discrimination against racial minorities and to prevent discrimination in the future.<sup>15</sup> Others are willing to allow the explicit use of race only in situations where "identifiable victims" of discrimination are compensated. The definition of "identifiable victims," however, is often so narrow that it leaves most blacks, as a class, without redress for the harms that this society has caused them.<sup>16</sup> I doubt that anything I could say in the context of this debate would cause adherents of either of these perspectives to change their minds.

Many others, however, comprehend and accept the general principle that race-conscious remedies are an unavoidable part of a genuine commitment to equal justice. At the same time, they are not necessarily prepared to allow *any* use of race simply because proponents of such an approach assert that it is the only way that true equality can be achieved.<sup>17</sup> Instead, I sense that they want satisfactory showings of the following: the discriminatory practice has been defined adequately; alternatives short of explicit reliance upon race have been canvassed and found wanting; and any race-conscious remedy has been sufficiently limited in scope and time to address the evil at hand without either eroding legitimate standards or converting an interim minority preference system into a permanent, institutionalized fixture. These are showings that those of us who have urged the adoption of race-conscious remedies ought to be able to make.

Adequate justifications for race-conscious remedies have, I believe, been

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15. See, e.g., L. GRAGLIA, *DISASTER BY DECREE* (1976) (criticizing racial assignment of students for purposes of desegregation); T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 37-60 (1984) (attacking use of statistics to prove racial discrimination).

16. See, e.g., *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn. 1984), *aff'd*, 801 F.2d 799 (6th Cir. 1986), in which the United States Department of Justice opposed a settlement of a long-standing higher education desegregation case that required the State of Tennessee, over a period of five years, to establish a special "pre-enrollment" program for 75 black college sophomores to train and prepare them for post-graduate study in the state's professional schools. Upon completion of the program, these students were to be admitted to the state's schools of law, veterinary medicine, dentistry, pharmacy, and medicine. The Reagan Administration opposed this program because the 75 black students who stood to benefit were not "actual victims" of discrimination. 593 F. Supp. at 1265. The trial court, in approving the settlement over the Justice Department's objection, stated that it regarded "practically all black men, women, and children in the state" as victims of Tennessee's former dual system of higher education. *Id.* For a thoughtful discussion of this issue in the employment context, see Daly, Stotts' *Denial of Hiring and Promotion Preferences for Nonvictims: Draining the 'Spirit' from Title VII*, 14 *FORDHAM URB. L.J.* 17, 96-101 (1985). See also Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 *HARV. L. REV.* 1327, 1337-46 (1986) for an interesting discussion of the importance of analyzing the motives of affirmative action opponents.

17. I think this spirit is reflected, for example, in Neuborne, *Observations on Weber*, 54 *N.Y.U. L. REV.* 546 (1979).

provided in several areas of American life. Given the resistance to the *Brown v. Board of Education*<sup>18</sup> decision in southern and border-state school systems, explicit use of race for purposes of student assignment was often unavoidable.<sup>19</sup> Otherwise, children would have continued to attend the racially segregated schools that *Brown* declared unconstitutional. Similarly, where employers or unions have engaged in longstanding and pervasive discrimination against blacks, other racial minorities, and women, remedies have properly extended beyond those who were directly and explicitly victimized by that discrimination.<sup>20</sup> The objective has been not only to rectify past discrimination but to prevent its recurrence. Experience has taught us that this goal can be achieved in some cases only through the use of remedies that have this scope.

Sufficient justifications, focusing on remedying discrimination,<sup>21</sup> have not been so forthcoming in the area of so-called voluntary affirmative action, in which criteria of race and sex have been used by university officials, employers, unions, and government agencies in allocating scarce resources. There have been several deficiencies. First, many of these programs have not been openly adopted and administered. Consequently, they have not benefited from the scrutiny and testing of means to ends assured by public deliberation. Programs that cannot survive the light of explicit consideration are highly susceptible to abuse and unlikely to have a stable existence. In a society in which we place such importance upon

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18. 347 U.S. 483 (1954).

19. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

20. See, e.g., *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985) (upholding remedy requiring Alabama state police to promote one black state trooper for each white trooper promoted), *cert. granted sub nom. United States v. Paradise*, 106 S. Ct. 3331 (1986); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (racial hiring quota ordered to desegregate Mississippi highway patrol). The recent Supreme Court decisions in *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986), and *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986), upholding race-conscious programs pursuant to a consent decree and a court finding of discrimination, respectively, fit into the same pattern.

21. What I have in mind here is discrimination that can be linked to a specific institution or industry, as opposed to what has come to be called "societal discrimination." Under the latter theory, the pervasive consequences of racial discrimination against blacks, in particular, would validate an institution's use of race-conscious criteria, regardless of whether the entity itself engaged in discriminatory conduct. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 369-73 (1978) (Brennan, J., concurring in part) (favoring societal discrimination approach); *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1847-48 (1986) (Powell, J., plurality opinion) (rejecting societal discrimination approach). Although the effects of America's history of discrimination against blacks, other minorities, and women are conspicuous and widespread, I question the utility of a concept as vague as "societal discrimination" in working out the appropriate nature, scope, and duration of race-conscious remedies. The concept of societal discrimination proves both too much and too little: too much, because it supports the use of race-conscious remedies even when they are unnecessary, such as when blacks, other minorities, and women are adequately represented in an institution given available pools; too little, because it discourages the search for evidence of past discriminatory practices and for remedies tailored to rectify that discrimination, such as when an institution's plan to increase minority and female membership is woefully inadequate to correct the effects of its own past practices.

"uninhibited, robust, and wide-open"<sup>22</sup> debate of public issues, it is difficult to justify the idea of privately adopted programs using racial criteria to allocate resources.

Second, many race-conscious affirmative action plans have not benefited during their formulation from the thorough deliberation that such plans require. Upon inspection, many plans appear to be the products of hasty decisions to "do something." No effort was made to identify the problem and to examine various alternative remedies, or to apply explicit racial criteria only after other solutions were proven inadequate to the task.<sup>23</sup> The causes of this rush to judgment are difficult to explain. In some cases, those involved were well-intentioned, but careless. In others, it appears that the originators were interested, at least in part, in using a race-conscious affirmative action plan as a preemptive strike to stave off objective inquiry into practices that might violate legal or constitutional requirements.<sup>24</sup>

Third, when such plans have become the subject of litigation, proponents of affirmative action in general have felt compelled to defend them in unqualified terms instead of helping the courts to develop criteria that separate permissible from impermissible programs, differentiating the plans that are well designed to counteract discrimination from those that promise no such result. The manner in which these affirmative action/reverse discrimination issues have been presented to the courts, and the political context in which the litigation has arisen, have made some degree of posturing understandable, even inevitable. When the question before the court appears to demand a categorical answer to the legitimacy of the explicit use of racial criteria, those in favor of the general principle may see no realistic alternative to defending each program. And judges sympathetic to race-conscious remedies in certain circumstances often seem to share the view that baby and bathwater must stay together.

Although this attitude can be explained, it should not be condoned. Such an approach weakens, not strengthens, the general principle of affirmative action. In the *Bakke* case, the Supreme Court considered a rejected white applicant's challenge to the constitutionality of a state medical school's minority admissions program. The challenger alleged that the admissions program set aside sixteen places, out of a total of one hundred, for which only minority applicants could compete. In a highly fragmented decision, the Supreme Court held that the admissions plan could not

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22. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

23. In both employment and higher education, for example, more aggressive recruitment may produce greater minority representation. Providing financial assistance or revising admissions requirements to remove elements known to disadvantage minorities also may remedy significant minority underrepresentation.

24. See *infra* note 30 and accompanying text.

stand, but affirmed that race might, under some circumstances, be a proper admissions criterion.

The debate over high principles in *Bakke* obscured the fact that the medical school's program did not justify the vigorous defense it received, on or off the bench. The record revealed little about why the program was established, after what deliberations, with what ultimate purpose, and, more specifically, why sixteen places were earmarked for minority applicants.<sup>25</sup> Instead, the Court was presented with a series of *post hoc* arguments from the medical school's lawyers in defense of the program, along with scores of amicus briefs hypothesizing how the challenged program might be found to accord with federal legal and constitutional requirements.

The Court could have concluded that, whatever the ultimate answer to questions about the legality and constitutionality of race-conscious admissions programs, the program at issue in *Bakke* had to fall. Our national sensitivity to racial classifications requires that they be used only when they represent a focused effort to remedy the effects of racial discrimination and to prevent its recurrence. Indeed, the *Bakke* case is particularly frustrating because an open, considered process might have produced a plan that would have been worth defending. The medical school faculty, which approved the challenged program, might have identified the degree to which its own institution had engaged in practices that unjustifiably limited minority enrollment, and on that basis, attempted to rectify those consequences. Perhaps the school would not have found such evidence, and would thus have inferred that the limitations were the product of actions by the larger university system of which it was a part.<sup>26</sup> The answer might then have been that these other institutions, not the medical school, should have had the responsibility for initiating race-conscious af-

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25. *Bakke*, 438 U.S. at 272-76. Commentators have lamented the Regents' failure to develop a record regarding discrimination against racial minorities in California. See Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 5-7 (1979); Bell, *Introduction: Awakening After Bakke*, 14 HARV. C.R.-C.L. L. REV. 1, 2-3 (1979); Jones, *Litigation Without Representation: The Need for Intervention To Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31, 69-77 (1979); Smith, *Reflections on a Landmark: Some Preliminary Observations on the Development and Significance of Regents of the University of California v. Allan Bakke*, 21 HOW. L.J. 72, 94-101 (1978).

26. This case could have been made. California law required separate schools for "Negroes, Mongolians and Indians" until 1880. Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae*, app. B at 16a, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811). Separate schools for Chinese, Japanese, and Indian children were mandated by California law until 1947. Brief of the NAACP Legal Defense and Educational Fund, *supra*, app. B at 17a-18a. In 1946, a California school district was found to have been operating a system that segregated Mexican-American and Anglo (white) children. *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947). For further examples of racial discrimination in California's primary and secondary educational system and its impact upon higher education, see Brief of the NAACP Legal Defense and Educational Fund, *supra*, at 57-59, app. B at 12a-30a.



firmative action programs. Instead, the Supreme Court's resolution in *Bakke* suggested that educational institutions could continue to use racial criteria in admissions as long as they did not embody "fixed quotas."<sup>27</sup> Presumably, with this caveat, racially explicit allocation programs could be developed and administered as before, without any attempt to identify discriminatory practices or to frame the program in terms of any set of specific conditions.<sup>28</sup>

*United Steelworkers of America v. Weber*<sup>29</sup> involved an explicitly race-based on-the-job training program designed to correct racial disparities in the petitioner's workforce. The program was the product of collective bargaining between management and the union representing both white and black employees. I am persuaded that the employer in *Weber*, whatever its other motivations, hoped that the race-conscious training program would divert attention from the fact that it had long been engaged in discriminatory employment practices that violated federal law.<sup>30</sup> The Supreme Court

27. *Bakke*, 438 U.S. at 316-19 (majority affirms that race may be used appropriately under some circumstances in admissions process).

28. Some colleges and universities, especially those outside of the southern and border states, may have difficulty linking persistently low representation of racial minorities to past or present intentional discrimination. However, concepts of discriminatory impact or effect, used elsewhere in the law, *see, e.g.,* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII employment action), could be a firm basis for affirmative admissions plans in the educational context as well. Specifically, some racial and ethnic minorities score disproportionately lower than whites on standardized tests such as the Scholastic Aptitude Test (SAT), the Medical College Admissions Test (MCAT) and the Law School Admissions Test (LSAT). *See* U.S. COMM'N ON CIVIL RIGHTS, TOWARD EQUAL EDUCATIONAL OPPORTUNITY: AFFIRMATIVE ADMISSIONS PROGRAMS AT LAW AND MEDICAL SCHOOLS 59-63 (1978); REPORT OF THE CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION, SELECTIVE ADMISSIONS IN HIGHER EDUCATION 37-38, 79-80 (1977). Because many schools rely heavily upon scores on these tests in making admissions decisions, racial minorities are disadvantaged. *Cf.* D. OWEN, NONE OF THE ABOVE 200-29 (1985) (discussing reliability of standardized tests as predictors of academic performance); Reynolds & Brown, *Bias in Mental Testing: An Introduction to the Issues*, in PERSPECTIVES ON BIAS IN MENTAL TESTING 1 (C. Reynolds & R. Brown eds. 1984) (same). No strong correlation has been established between admissions test scores and performance in the practice of law or medicine. Given the disparate impact of these tests, the uncertainty of their predictive validity, and the history of systematic discrimination against certain racial and ethnic minorities in the American educational system, colleges and universities would be justified in employing special admissions criteria to reduce these discriminatory barriers to minority access. *See* Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815, 816-19 (1980). Although some institutions of higher education may already operate such programs, two factors are often absent. First, schools should develop plans that are responsive to their own particular situations in terms of the percentages or goals set for minority admissions, the minority groups included in the programs, and the duration of the special admissions efforts. Second, schools should publicize the rationales for their programs so that details are not left to speculation.

29. 443 U.S. 193 (1979).

30. The *Weber* case involved Kaiser Aluminum's operations in Gramercy, Louisiana. Kaiser had already faced court challenges to its employment practices from blacks at its Baton Rouge and Chalmette, Louisiana plants. The Baton Rouge controversy was settled by a consent decree requiring Kaiser to pay \$225,000 to the plaintiff class. *Burrell v. Kaiser Aluminum & Chem. Corp.*, No. 67-86 (M.D. La. Feb. 24, 1975). In the Chalmette action, the plaintiffs were held to have established a prima facie case of discrimination against blacks in hiring for craft positions on the basis of statistics much like those at the Gramercy plant before the training program at issue in *Weber* was instituted.

determined, however, that the challenged program, which allocated fifty percent of the slots in a craft-training class to blacks and fifty percent to whites, did not violate Title VII of the 1964 Civil Rights Act.

The *Weber* training program was the result of the collective bargaining process, not the closed procedure apparently followed by the medical school in *Bakke*. There was also some effort in the bargaining process to identify the extent to which black workers were underrepresented in the employer's skilled crafts and to establish a long-range goal of bringing black representation up to the percentage of such workers in the local workforce. Yet the Court explained only that the plan satisfied legal requirements because its "purposes . . . mirror[ed] those of the statute," and did not "unnecessarily trammel the interests of the white employees."<sup>31</sup> Given the vagueness of these criteria, it is difficult to imagine their application beyond the *Weber* case itself. One is left to conjecture whether any plan would fail this test as long as its avowed purpose was to ameliorate the condition of black workers, and as long as it was structured to bring black representation up to its proportion in the local labor force.

Employers may protest that they should not be required to give a thorough accounting of their past discriminatory practices in the process of developing a race-conscious affirmative action plan lest they open themselves to suits by black victims of those practices.<sup>32</sup> One can accept this concern, however, without conceding that employers have no responsibility to develop affirmative action plans correlated to their past discriminatory practices and to their realistic ability to remedy the effects of those practices. In brief, the Court in *Weber* should have required the employer and union to have made a showing of past discrimination. Instead, the Court gave blanket approval to the plan, suggesting once again that race-conscious programs need not be well-tailored or linked in a more than generalized fashion to existing patterns of discrimination. This ruling sup-

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See *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1389-90 (5th Cir. 1978). Several years before Kaiser Aluminum established its craft-training program, the Department of Labor had pressured the corporation to increase its employment of blacks. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 226 (5th Cir. 1977). The Labor Department's authority in this respect derived from Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65), reprinted in 42 U.S.C. § 2000e, at 28-31 (1982), requiring non-discrimination by government contractors such as Kaiser.

31. *Weber*, 443 U.S. at 208.

32. In his *Weber* concurrence, Justice Blackmun suggested, properly in my estimation, "that employers and unions who had committed 'arguable violations' of Title VII should be free" to institute voluntary, race-conscious affirmative action programs like Kaiser's without fearing challenges by white employees. *Id.* at 211. I also find attractive Justice O'Connor's concurrence in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1854-57 (1986), in which she considers the role of findings of discrimination in assessing the constitutionality or legality of race-conscious remedies. She suggests that while contemporaneous findings of discrimination are preferable to justify race-conscious remedies, they should not be required. Rather, the institution involved should be expected only to have a "firm basis for determining that affirmative action is warranted." *Id.* at 1856. This "firm basis" may be gained by evidence of discriminatory impact. *Id.*

plied yet another argument for those seeking to discredit the underlying principle of race-conscious remedies.

### III. THE CASE OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977

Congress did no better than the medical school sued in *Bakke*, and considerably worse than labor and management in *Weber*, in justifying the race-conscious approach it adopted in the Public Works Employment Act of 1977. In July 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976,<sup>33</sup> charged the Secretary of Commerce with the responsibility of disbursing funds through the Economic Development Administration (EDA). The Act provided that the funds were to be available for appropriation until September 30, 1977.<sup>34</sup>

In May 1977, Congress amended the 1976 Act and authorized an additional four billion dollars for similar projects. The total of six billion dollars was to be available for appropriation until December 31, 1978.<sup>35</sup> The new statute, entitled the Public Works Employment Act of 1977, made various changes in the 1976 Act, including the addition of the "minority business enterprise" provision, which states:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.<sup>36</sup>

As originally proposed, the 1977 Act did not contain any provision directing that a percentage of the funding be set aside for minority contractors. The minority business enterprise provision was first proposed on the

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33. Pub. L. No. 94-369, §§ 101-111, 90 Stat. 999, 999-1002 (1976) (codified as amended at 42 U.S.C. §§ 6701-10 (1982)).

34. 42 U.S.C. § 6710 (1982).

35. *Id.*

36. *Id.* § 6705(f)(2).

floor of the House of Representatives as an amendment to the Act by Representative Parren Mitchell (D. Md.) on February 24, 1977.<sup>37</sup> The House approved the amendment the same day.<sup>38</sup> In the Senate, Senator Edward Brooke (R. Mass.) moved on March 10, 1977 to amend the Senate version of the Act to include a similar provision establishing a set-aside for minority contractors.<sup>39</sup> The Senate bill, with the Brooke amendment, was passed on the same day.<sup>40</sup> After referring the two bills to conference, both houses agreed to the Mitchell amendment. The Act was signed into law on May 3, 1977.

The 1976 Act and the 1977 amendments contained several provisions designed to ensure that the local public works program would have its intended effect of providing an immediate boost to the economy generally and to the construction industry in particular. Congress directed that no part of any public works project funded under the statute should be performed directly by any state or local government agency. Rather, all project construction was to be performed by private contractors who submitted the lowest competitive bids in response to invitations from the grantees and who met established criteria of responsibility.<sup>41</sup> In addition, Congress required grant applicants to give satisfactory assurance that on-site labor would begin within ninety days of project approval,<sup>42</sup> and instructed the Secretary of Commerce to make a final determination on each grant application within sixty days of the application's receipt.<sup>43</sup> Moreover, the Act required that the federal funds be committed to state and local grantees by September 30, 1977.<sup>44</sup>

In accordance with the requirements of the 1976 Act, the Secretary re-issued regulations to implement the local public works program. The regulation concerning the minority business enterprise provision reaffirmed that no grant would be awarded unless the ten percent set-aside requirement was met.<sup>45</sup> It also provided, however, that the requirement would not be applied rigidly if the appropriate EDA official determined that the ten percent set-aside could not be filled "by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured."<sup>46</sup>

To supplement and clarify the statute and regulation, EDA issued

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37. 123 CONG. REC. 5327 (1977).

38. *Id.* at 5332.

39. *Id.* at 7155-56.

40. *Id.* at 7156.

41. 42 U.S.C. § 6705(e)(1) (1982).

42. *Id.* § 6705(d).

43. *Id.* § 6706.

44. Act of May 13, 1977, Pub. L. No. 95-29, 91 Stat. 122.

45. 13 C.F.R. § 317.19(b)(1) (1985).

46. *Id.* § 317.19(b)(2).

guidelines governing minority business participation in local public works grants. EDA also issued a technical bulletin providing detailed instructions and information to assist grantees and their contractors in meeting the ten percent requirement.<sup>47</sup> The guidelines stated that “[t]he primary obligation for carrying out the 10% [minority business enterprise] participation requirement rests with EDA Grantees.”<sup>48</sup> This obligation could be satisfied through the grantee’s “own simple or prime contracts or through the subcontracts or supply contracts of its prime contractors.”<sup>49</sup> The guidelines required grantees to submit reports to EDA describing actual and expected minority business participation, both before the issuance of the first federal letter of credit and after the project was forty percent complete. In addition, grantees had to file a statement from each participating minority firm “certifying that the minority firm is a *bona fide* minority business enterprise and that the minority firm has executed a binding contract to provide a specific service or material to the project for a specific dollar amount.”<sup>50</sup>

The guidelines provided that EDA would approve a grantee’s request for a waiver of the minority business requirement if the grantee demonstrated that “there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location. . . .”<sup>51</sup> Recognizing that a grantee might encounter difficulties in attempting to comply with the ten percent set-aside in an area where the minority population was small, the guidelines also permitted a grantee to “apply for a waiver before requesting bids on its project or projects if it can show that there are no relevant, available, qualified minority business enterprises which could reasonably be expected to furnish services or supply materials for the project.”<sup>52</sup>

One can only marvel at the fact that the minority set-aside provision was enacted into law without hearings or committee reports, and with only token opposition.<sup>53</sup> In this regard, the set-aside provision joins many other federal statutes which have become law with equally barren empirical justification and without close scrutiny. Ordinarily, however, civil

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47. ECONOMIC DEV. ADMIN., U.S. DEP’T OF COMMERCE, GUIDELINES FOR ROUND II OF THE LOCAL PUBLIC WORKS PROGRAM (1977); ECONOMIC DEV. ADMIN., U.S. DEP’T OF COMMERCE, GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS (1977) [hereinafter GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION]; EDA MINORITY BUSINESS ENTER. TECHNICAL BULLETIN (1977). Certain relevant portions of the Guidelines and the Technical Bulletin are set out in the appendix to Chief Justice Burger’s opinion in *Fullilove*, 448 U.S. at 492-95 app.

48. GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION, *supra* note 47, at 2.

49. *Id.* at 9.

50. *Id.* at 13.

51. *Id.* at 14.

52. *Id.* at 15.

53. The Senate vote in favor of the bill was 71 to 14. 123 CONG. REC. 12,943 (1977). The House vote was 335 to 77. *Id.* at 13,256-57.

rights laws have received quite distinct treatment. Federal laws designed to assist blacks or other racial minorities have generally not been enacted without extensive hearings, committee deliberations in each House, consideration by a conference committee, conference committee reports, and vigorous floor debate. Moreover, none of these laws, with the exception of the Freedmen's Bureau Act,<sup>54</sup> contained explicit racial classifications.

In *Fullilove*, the Supreme Court voted six to three to affirm the constitutionality of the 1977 Act's set-aside. Writing also for Justices White and Powell, Chief Justice Burger concluded that Congress had constitutional authority under the spending and commerce powers, as well as under section 5 of the Fourteenth Amendment, to enact remedial legislation directed at racial discrimination.<sup>55</sup> The Chief Justice found that over the past two decades, Congress' efforts to solve problems associated with discrimination against minority businesses provided an "abundant historical basis" upon which it could have "reasonably determined" that such action was necessary to ensure "equal protection of the laws."<sup>56</sup> In the Chief Justice's view, "Congress . . . may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."<sup>57</sup> Finally, he determined that the minority set-aside provision that Congress adopted to address this discrimination "does not violate the Constitution."<sup>58</sup>

Justice Powell, who joined in the Burger opinion, wrote separately to restate his view on the proper standard of review. Unlike the Chief Justice, Justice Powell contended that the set-aside provision had to be judged by "the most stringent level of review" because it employed a racial classification.<sup>59</sup> Repeating his position in *Bakke*,<sup>60</sup> Justice Powell asserted that the challenged provision could be upheld only if it constituted "a necessary means of advancing a compelling governmental interest."<sup>61</sup> He granted, however, that "ameliorating the disabling effects of identified discrimination"<sup>62</sup> would meet that standard if three other requirements were

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54. Freedmen's Bureau Act, ch. 200, 14 Stat. 173, 175 (1866) (conveying disputed lands to "heads of families of the African race"). See generally Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (discussing Court's disregard of original intent of framers' of Fourteenth Amendment). Congress included in the 1965 Voting Rights Act, in equally summary fashion, a provision allowing persons educated in Puerto Rican schools to vote in state elections regardless of their English literacy. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e)(2), 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b(e)(2) (1982)). The Supreme Court upheld its constitutionality in *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

55. *Fullilove v. Klutznick*, 448 U.S. 448, 473-77 (1980) (opinion of Burger, C.J.).

56. *Id.* at 478.

57. *Id.*

58. *Id.* at 492.

59. *Id.* at 496 (Powell, J., concurring).

60. *Regents of the Univ. of Cal. v. Bakke*, 438 U. 265, 299 (1978) (Powell, J., concurring).

61. 448 U.S. at 496 (Powell, J., concurring).

62. *Id.* at 497.

also met. First, the governmental body that established the racial classification “must have the authority to act in response to identified discrimination.”<sup>63</sup> Second, that governmental body “must make findings that demonstrate the existence of illegal discrimination.”<sup>64</sup> Third, the classification must be “equitable and reasonably necessary to the redress of identified discrimination.”<sup>65</sup> Applying these criteria to the set-aside provision, Justice Powell found that it passed constitutional muster.<sup>66</sup>

Justice Marshall, writing also for Justices Brennan and Blackmun, provided the other three votes that made the majority for upholding the set-aside. In evaluating the constitutionality of the set-aside provision, Justice Marshall invoked the test which he and three other justices had adopted in *Bakke*.<sup>67</sup> Under that test, racial classifications employed ostensibly for purposes of remedying past racial discrimination are constitutional if they “serve important governmental objectives and are substantially related to achievement of those objectives.”<sup>68</sup> Furthermore, the racial classification must have “an important and articulated purpose for its use,”<sup>69</sup> and must not be one that “‘stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.’”<sup>70</sup> Justices Marshall, Brennan, and Blackmun found it “not even a close one”<sup>71</sup> that the minority set-aside provision satisfied these criteria.

The efforts to delineate the appropriate test for evaluating the constitutionality of racial classifications ran from Justice Powell’s “strict scrutiny” to Chief Justice Burger’s “most searching examination” to Justice Marshall’s “substantially related to an important governmental objective.” The truth is, however, that all the members of the majority applied a standard that fell below any of the ones upon which they claimed to rely.<sup>72</sup> In the absence of any significant legislative history, these Justices looked to a variety of congressional reports, hearings, and legislation related to the general condition of minority business enterprises. On this basis, they wrote their own *post hoc* rationalizations, concluding not that

63. *Id.* at 498.

64. *Id.*

65. *Id.* at 510.

66. *Id.* at 516–17.

67. 438 U.S. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).

68. 448 U.S. at 519 (Marshall, J., concurring in judgment).

69. *Id.* (quoting *Bakke*, 438 U.S. at 361).

70. *Id.* (quoting *Bakke*, 438 U.S. at 361).

71. *Id.*

72. Indeed, the standard resembles the “rational relationship” test the Court has applied recently to other congressional legislation. *See, e.g.*, *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174–75 (1980).

Congress "could reasonably have" relied, but in fact that Congress did rely, upon this societal condition in enacting the minority set-aside.<sup>73</sup>

Attacking the constitutionality of the set-aside, the dissenters focused precisely on this major defect in the historical record. Justice Stewart, writing also for Justice Rehnquist, rejected the proposition that legislatures, including Congress, were institutionally competent to develop constitutionally permissible race-conscious remedies for discrimination. He thought that they possessed "neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination."<sup>74</sup> Justice Stewart assumed that only equity courts had such competence. But this Stewart/Rehnquist position cannot be squared with either the plain language of the Fourteenth Amendment, specifically section 5, or the history of that amendment's ratification. Both point to the expectation that Congress would secure the guarantee of equal protection, especially to blacks facing racial discrimination.<sup>75</sup> Moreover, this declaration of congressional incompetence and view of court equity powers elevates the role of the federal judiciary far beyond that envisioned by *Marbury v. Madison*.<sup>76</sup> In these dissenters' view, apparently, even a *state* trial court judge would be constitutionally competent to order a race-conscious remedy whereas the United States Congress would not.

Justice Stewart found the set-aside unconstitutional, even assuming, *arguendo*, that Congress were competent to devise race-conscious remedies. His evaluation of the record led him to conclude that the set-aside "was in whole or in part designed to effectuate objectives other than the elimination of the effects of racial discrimination . . . ."<sup>77</sup>

Justice Stevens did not join in Justice Stewart's blanket rejection of congressionally devised race-conscious remedies. Instead, he conceded that such approaches might be constitutional. Justice Stevens stated, however,

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73. "Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate . . . ." 448 U.S. at 478 (opinion of Burger, C.J.). "In my view, the legislative history of § 103(f)(2) demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.* at 503 (Powell, J., concurring) (footnote omitted). "Congress reasonably determined that race-conscious means were necessary to break down the barriers confronting participation by minority enterprises . . . ." *Id.* at 521 (Marshall, J., concurring in judgment).

74. *Id.* at 527 (Stewart, J., dissenting) (footnote omitted).

75. *Oregon v. Mitchell*, 400 U.S. 112, 126-29 (1970) (opinion of Black, J.); *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1880); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

76. The doctrine established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that federal courts have the power to declare what the Constitution compels, has not been interpreted to suggest that other branches of the federal government are inherently incapable of acting on matters generally placed within their authority by the Constitution. See, e.g., Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 715-16 (1985).

77. 448 U.S. at 530 (Stewart, J., dissenting).



that because "racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."<sup>78</sup> He took the position, therefore, that the Court had a "special obligation to scrutinize" any such legislation as to its substance as well as to the regularity of the process that brought it into being.<sup>79</sup>

With respect to the due process analysis, Justice Stevens concluded that any congressional legislation that established racial classifications must be shown to have been "adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose."<sup>80</sup> He thought that when Congress creates a special preference or disability, it is constitutionally required to identify the characteristic justifying the special treatment, particularly where racial classifications are concerned.<sup>81</sup>

Applying these standards to the set-aside provision, Justice Stevens found the racial classifications and the requirement of ten percent (as opposed to some other figure) neither "clearly identified" nor "unquestionably legitimate."<sup>82</sup> Moreover, he concluded that the record reflected Congress' "failure to follow procedures that guarantee the kind of deliberation" that a statute containing a racial classification "obviously merits."<sup>83</sup> For these reasons, he dissented.

Although one can disagree, as do I, with Justice Stevens' conclusion that procedural flaws in the enactment of the minority set-aside provision rendered it unconstitutional, the force of his critique is hard to ignore. It certainly is a source of my concerns. Even proponents of such remedies should demand that these efforts by the federal government to assist minority contractors be the result of an open, thorough, and considered process. Without a careful examination of the facts and alternatives, the legislation may be misdirected and fail to assist those most deserving of aid, may assist those who are able to operate without such preferences, may harm others unjustifiably, and may operate, even under the best of circumstances, longer than necessary.<sup>84</sup> When Congress has taken the ex-

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78. *Id.* at 533-35 (Stevens, J., dissenting) (footnotes omitted).

79. *Id.* at 548.

80. *Id.* at 551.

81. *Id.* at 553.

82. *Id.* at 535, 553-54.

83. *Id.* at 552.

84. Corruption in federally funded programs is not unusual. Charges of sham minority business enterprises, however, have produced unusually strident criticism of set-aside programs. This reaction may be caused in part by the belief that such programs are, by their very design, susceptible to corruption and abuse. *See, e.g., Set Set-Asides Aside*, NEW REPUBLIC, May 5, 1986, at 10-11. I suggest, however, that these criticisms can be met effectively by care and caution in establishing set-

traordinary step of adopting an explicit racial classification, as it did in the Public Works Employment Act, the Court has the responsibility to assure itself that the decision was reasoned and deliberate.

This is so not because Congress lacks the constitutional power to enact such legislation, but because it may have enacted legislation without proper attention to the degree that its actions may threaten "values of permanent significance"<sup>85</sup> in our society. One such value, albeit honored more in the breach than in observance, is that of a "color-blind Constitution."<sup>86</sup> To say that the principle of a "color-blind Constitution" has been violated and that "[i]n order to get beyond racism, we must first take account of race"<sup>87</sup> is not to deny that a "color-blind Constitution," and a society in which government avoids using race to allocate benefits and burdens among its citizenry, are the ultimate goals we seek. The Court is in a unique position to demand that when congressional action violates the principle of color-blindness, as the minority set-aside provision does, Congress must demonstrate that it has relied on a complete record and has acted with a full understanding of the program's implications. The Court's purpose, therefore, is not to redirect Congress' decisions; rather, the Court, in order to evaluate and rule in a principled manner, should compel Congress to act in an equally principled fashion.<sup>88</sup>

asides.

85. This phrase from Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 27 (1957) appears in the following context, which I think bears upon my critique of *Fullilove*:

There is unlikely to be such an awareness in a body constituted and occupied as Congress is, and responding quite properly to the pressures of those it is responsible to. The popular voice which expresses without inhibition what is wanted in the way of immediate, palpable results should be heard somewhere and Congress is that place. But Congress cannot normally be expected also to be aware that some of the means chosen to achieve immediate ends impinge in not easily apparent fashion on *values of permanent significance*. Were this not so the Constitution, which embodies such values . . . could be left to the care of Congress alone. But the Supreme Court also guards it and draws from it what is enduring.

*Id.* (emphasis added).

86. This phrase is traditionally credited to Justice Harlan who, in dissenting from the Court's decision upholding racial segregation in public transportation, said:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

*Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (emphasis added). For a modern articulation of the principle of color-blindness, see *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

87. *Bakke*, 438 U.S. 265, 407 (opinion of Blackmun, J.).

88. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 164-66 (1962) (discussing *Kent v. Dulles*, 357 U.S. 116 (1958), where Court obliged Congress to give due reconsideration to federal rules respecting denial of passports to suspected subversives). But see Linde, *Due Process of Lawmaking*, 55

## IV. POST-FULLILOVE MINORITY SET-ASIDES

Developments subsequent to *Fullilove* have reflected no greater attention to principled decisionmaking. At the federal level, the Department of Transportation issued regulations in 1980 that required states to submit plans with minimum goals for contracting with minority and women owned business enterprises in order to be eligible for federal funds.<sup>89</sup> In an early constitutional challenge to these regulations, a federal trial court took the position that such provisions could be upheld only if the agency could show: first, that it had been given express authority by Congress to take such action;<sup>90</sup> second, that it had made findings of past discrimination;<sup>91</sup> and third, that its regulatory actions were responsive to that discrimination.<sup>92</sup> Because the Department of Transportation was unable to meet any of these requirements, the court issued a preliminary injunction against implementation of the regulations.<sup>93</sup>

Another federal district court, however, found that the regulations were within constitutional limits.<sup>94</sup> Explicitly rejecting the earlier court's approach, it found that the "[p]ronouncements of the President, declarations of policy by the Congress, findings of discrimination by the Congress and the President regarding other similar legislation, and the findings of the Secretary of Transportation as a result of the Notice and Comment"<sup>95</sup>

NEB. L. REV. 197, 222-44 (1976) (legislatures cannot and should not be held to standard of rational lawmaking). Whatever the force of Linde's arguments generally, they are insufficient when the legislature proposes to enact statutes establishing explicit racial classifications.

89. 49 C.F.R. § 23.45 (1980).

90. *Central Alabama Paving, Inc. v. James*, 499 F. Supp. 629, 636 (M.D. Ala. 1980).

91. *Id.*

92. *Id.* at 639.

93. The district court relied principally upon *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (Civil Service Commission regulation excluding aliens from federal service held unconstitutional because not expressly mandated by Congress or President) for the proposition that administrative agencies must be "expressly empowered by Congress to impose . . . preferential classifications . . ." 499 F. Supp. at 636. The Department of Transportation conceded that it had no express congressional authority for the challenged regulations, but argued that support could be inferred from several general statutory grants. The court rejected each of these claims, including the Department of Transportation's reliance upon Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1982) (non-discrimination in federally funded programs), because the regulations in question did not have the required prior approval of the Attorney General. 499 F.Supp. at 638. Regarding findings of discrimination, the court noted "the candid admissions of counsel" for the Department of Transportation that none were made prior to promulgation of the set-aside regulations. *Id.* at 639.

94. *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338 (M.D. Tenn. 1981).

95. *Id.* at 349. Despite general approval of the agency's set-aside requirements, the court in *M.C. West* rejected the Department of Transportation's asserted reliance upon Title VI and four other federal statutes for its set-aside regulations. *Id.* at 345-46. Instead, it found that "[a] more direct line of authority for the Secretary's regulations comes through the Small Business Act [15 U.S.C. § 631(e)(1)(A)-(G) (1982)] and the President's Executive Orders issued pursuant thereto." *Id.* at 346. For a comprehensive discussion of the Small Business Administration's minority business enterprise program and the *Central Alabama Paving* and *M.C. West* decisions, see Drabkin, *Minority Enterprise Development and the Small Business Administration's Section 8(a) Program: Constitutional Basis and Regulatory Implementation*, 49 BROOKLYN L. REV. 433 (1983).

procedure justified the set-aside requirements. In effect, this court simply imitated the *Fullilove* majority, bringing together bits and pieces to validate a program for which no systematic justification had been provided.<sup>96</sup>

The first court was subsequently convinced to vacate its injunction against the Department of Transportation's set-aside regulations on the ground that Congress had passed legislation in the interim that explicitly directed the Department to set aside ten percent of authorized appropriations for minority business enterprises.<sup>97</sup> In the face of this development, the court could no longer contend that the Department of Transportation lacked explicit congressional authority to require state agencies to establish minimum goals for such businesses. Ironically, however, this intervening set-aside provision, like its counterpart in the Public Works Employment Act, was also unsupported by congressional hearings or reports because it was added as a floor amendment and received only limited discussion prior to enactment.<sup>98</sup> Consequently, although the question of con-

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Another district court also found the Small Business Act, *supra*, sufficient congressional authority to justify rejecting a constitutional attack on an Army Corps of Engineers small business set-aside program. *Taylor v. Marsh*, No. 81-H-1203E (N.D. Ala. Aug. 20, 1981). Another challenge to this program remains in court. *Valley Constr. Co. v. Marsh*, 714 F.2d 26 (5th Cir. 1983) (vacating lower court holding of mootness and remanding for trial).

96. The Department of Transportation changed one major feature of its set-aside regulations after the decision in *Central Alabama Paving*, 499 F. Supp. 629 (M.D. Ala. 1980), but before *M.C. West*, 522 F. Supp. 338 (M.D. Tenn. 1981). In *Central Alabama Paving*, the court enjoined, *inter alia*, a provision of the set-aside regulations, 49 C.F.R. § 23.45(i) (1980), that established a "conclusive presumption" that if any bidder was able to achieve the goal for minority business enterprise participation established for a particular contract, then all bidders that did not meet the goal would be ineligible. 499 F. Supp. at 631-32. After review by the Department of Transportation, this provision was substantially amended on April 27, 1981 to require a showing only that bidders made "good faith efforts" to meet the goals for minority participation. 49 C.F.R. § 23.45(h)(2) (1981). For discussion of this change, see *M.C. West*, 522 F. Supp. at 339-40.

97. See Motion for Clarification of Preliminary Injunction, *Central Alabama Paving, Inc. v. Wallace*, 499 F. Supp. 629 (M.D. Ala. filed May 12, 1983) (No. 80-358-N). In response, the Government argued that the new statute rendered the earlier action moot and that the injunction should therefore be vacated. Response of Federal Defendants to State Defendants-Third Party Plaintiffs' Motion for Clarification of Preliminary Injunction at 3. The court responded to these submissions by dissolving its preliminary injunction. Order Dissolving Preliminary Injunction, *Central Alabama Paving*, 499 F. Supp. 629 (M.D. Ala. July 20, 1983) (No. 80-358-N).

98. Congress enacted the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983) in January 1983. The Act raised the federal tax on gasoline by five cents and authorized appropriations for highway construction and other transportation related functions. It also contained a provision directing the Secretary of Transportation to set aside 10% of the amount of authorized appropriations to be "expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. . . ." *Id.* § 105(f), 96 Stat. 2097, 2100. Section 105(f) reads as follows:

Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

*Id.* Under the relevant provision of the Small Business Act, the category "socially and economically disadvantaged individuals" is presumed to include "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities . . ." 15 U.S.C. § 637(d)(3)(C) (1982).

gressional authorization was resolved by explicit legislation, this legisla-

To be included within the category of "socially and economically disadvantaged individuals," non-minority persons must receive the specific approval of the Small Business Administration. *Id.* Consequently, although it does so by some indirection, the Surface Transportation Assistance Act, *supra*, is aimed at providing special opportunities to members of the same racial and ethnic minorities explicitly mentioned in the minority set-aside provision of the Public Works Employment Act of 1977, Pub.L. 95-28, 91 Stat. 116 (1977), upheld in *Fullilove*.

This more recent provision originated in the House of Representatives as a floor amendment by Representative Mitchell (D. Md.), 128 CONG. REC. H8954 (daily ed. Dec. 6, 1982), principal sponsor of the 1977 set-aside. There are several other similarities between the two enactments. The new set-aside was passed without prior committee hearings or reports. The legislative history of the Surface Transportation Assistance Act, *supra*, 1982 U.S. CODE CONG. & ADMIN. NEWS 3639, is silent on the set-aside provision. The only legislative history is a brief floor statement by Representative Mitchell indicating that the provision was designed, like the Public Works Employment Act of 1977, *supra*, to be a "set aside for small and . . . disadvantaged businesses . . . to insure the participation of the businesses in these massive public spendings." 128 CONG. REC. H8954 (daily ed. Dec. 6, 1982). Rep. Mitchell went on to express concern about the "disproportionate unemployment enjoyed by minorities" and his fear that, without the set-aside, the "twin forces of racism and economic discrimination will once again raise their ugly heads," and exclude blacks and other minorities from the "employment rejuvenation program" contemplated by the Surface Transportation Assistance Act. *Id.* He stated that the program was projected to "create nearly 300,000 jobs." *Id.* In support of his amendment, Rep. Mitchell made explicit reference to the fact that his earlier set-aside proposal had been upheld by the Supreme Court, though he did not mention *Fullilove* by name:

I would simply like to indicate that, based on the experience of the Public Works Act of 1977, the amendment met with enormous success. There was a test as to its constitutionality. The Supreme Court in 1980 upheld the constitutionality of it. That is all we are dealing with, is a set-aside for small and disadvantaged businesses in this amendment.

*Id.* He added that, as a result of that program, "[o]ver \$600 million were awarded to minority businesses" and "many jobs for the minority population" were created. *Id.*

After House passage, the set-aside provision went to conference without any formal action by the Senate. The House bill was amended in conference to grant the Secretary of Transportation some discretion in implementing the set-aside provision. The Act became law on January 6, 1983. Pub. L. No. 97-424, 96 Stat. 2097 (1983).

The Department of Transportation published a notice of proposed rulemaking with respect to § 105(f) of the Small Business Act on February 28, 1983, 48 Fed. Reg. 8416 (1983) (to be codified at 49 C.F.R. pt. 23). A final rule was published on July 21, 1983, 48 Fed. Reg. 33,432 (1983) (to be codified at 49 C.F.R. pt. 23). These regulations, like those promulgated pursuant to the Public Works Employment Act of 1977, *supra*, contain provisions for obtaining waivers of the 10% goal, procedures for challenging businesses claiming to be minority enterprises, and definitions of "socially and economically disadvantaged individuals." See generally, Participation by Minority Business Enterprises in Department of Transportation Programs, 48 Fed. Reg. 33,436-40 (1983). The final rule also retained a "rebuttable presumption" contained in the February 28, 1983 notice of proposed rulemaking, that "Black-Americans, Hispanic-Americans, and members of the other groups" were "socially and economically disadvantaged." *Id.* at 33,435. The Department of Transportation included this provision based in part upon the Department of Justice's advice that "in the event of a legal challenge to section 105(f), a conclusive presumption will be more difficult to defend." *Id.* Other persons, including women, may be added to this category on a case-by-case basis. *Id.* In this regard, the Surface Transportation Assistance Act, *supra*, differs markedly from the legislation challenged in *Fullilove*. In *Fullilove*, members of the mentioned racial and ethnic groups benefited from a conclusive statutory presumption that entitled them to the 10% set-aside provision, irrespective of whether they were "socially and economically disadvantaged." In fact, one district court found this feature of the Public Works Employment Act of 1977, *supra*, a basis for declaring the Act unconstitutional as applied to Native Americans who were, it contended, "indistinguishable in name, skin color, dress, and use of language from their non-Indian neighbors." *Montana Contractors' Ass'n v. Secretary of Commerce*, 460 F. Supp. 1174, 1178 (D. Mont. 1978). The constitutionality of the Surface Transportation Assistance Act, *supra*, is currently the subject of federal court challenges by non-minority contractors. *Carpenter v. Dole*, No. 85-527-CN-5 (E.D.N.C. filed May 17, 1985); *Tennessee Asphalt Co. v. Farris*, No. 3-85-1176 (M.D. Tenn. filed Oct. 4, 1985). The Act is also being challenged in *Groves & Sons Co. v. Fulton County*, No. C82-1895A (N.D. Ga. filed Sept. 30, 1985) in which the

tion did nothing to explain what practices Congress viewed as discriminatory, or why Congress determined that a ten percent set-aside was the appropriate response. The Agency, therefore, was still at sea with respect to the precise nature of the policy it was directed to enforce.<sup>99</sup>

*Fullilove* clearly focused on the constitutionality of a *congressionally* mandated set-aside program. However, the fact was not lost upon states and localities that only Chief Justice Burger, and perhaps Justice White, thought it dispositive that the set-aside emanated from Congress.<sup>100</sup> The other opinions making up the majority include tests that would appear to apply to similar enactments by governmental bodies other than Congress.<sup>101</sup> Indeed, even Justices Stewart, Rehnquist, and Stevens, in dissent, evidently do not hold states to higher standards than those applicable to Congress.<sup>102</sup> Based upon this reasoning, states and localities have initiated a variety of set-aside programs modeled more or less on the federal program upheld in *Fullilove*.<sup>103</sup>

Justice Powell explicitly reserved judgment on whether he would find set-asides constitutional if they were established by governmental bodies

court has held that the county was not authorized by state law to establish a minority set-aside. However, based upon the county's claim that the program at issue was required by the Department of Transportation, the court directed that the agency be joined as a "necessary party" under FED. R. Civ. P. 19 and brought into the litigation.

99. Congress has also included set-asides in foreign affairs legislation without many preliminaries. A recent amendment to the Foreign Assistance Act of 1961, Pub. L. No. 98-151, 97 Stat. 964, 970-71 (1983), reads as follows:

*Minority Set-Aside*

Except to the extent that the Administrator of the Agency for International Development determines otherwise, not less than 10 percent of the aggregate of the funds made available for the fiscal year 1984 to carry out chapter 1 of part I of the Foreign Assistance Act of 1961 shall be made available only for activities of economically and socially disadvantaged enterprises (within the meaning of section 133(c)(5) of the International Development and Food Assistance Act of 1977), historically Black colleges and universities, and private and voluntary organizations which are controlled by individuals who are Black Americans, Hispanic Americans, or Native Americans, or who are economically and socially disadvantaged (within the meaning of section 133(c)(5) (B) and (C) of the International Development and Food Assistance Act of 1977). For purposes of this section, economically and socially disadvantaged individuals shall be deemed to include women.

*Id.* The Foreign Assistance Act set-aside provision was extended into the 1985 fiscal year. Pub. L. No. 98-473, § 127, 98 Stat. 1891 (1984).

100. The Chief Justice acknowledged that the Court faced its "gravest and most delicate duty" in passing on the constitutionality of an act of Congress. *Fullilove*, 448 U.S. at 472 (quoting *Blodget v. Holden*, 275 U.S. 142, 148 (1927)). Even where the legislation employed ethnic or racial criteria, as did the minority business enterprise provision, it was the Court's responsibility, the Chief Justice said, to examine the act closely but with "appropriate deference to the Congress . . ." *Id.* He pointed out that the Court was passing "not on a choice made by . . . a school board, but on a considered decision of the Congress and the President," *id.* at 473, implying that his position would be different were action by a governmental entity other than Congress at issue. Chief Justice Burger found it "fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress . . ." *Id.* at 483.

101. 448 U.S. at 495 (Powell, J., concurring); *id.* at 517 (Marshall, J., concurring in judgment).

102. *Id.* at 523-24 (Stewart, J., dissenting); *id.* at 548 (Stevens, J., dissenting).

103. See *supra* note 10 for a listing of these programs.

other than Congress.<sup>104</sup> He observed in this regard that “[t]he degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body.”<sup>105</sup> Yet state and municipal bodies establishing set-asides have not heeded this caution. Nor have courts passing on the constitutionality of state and local set-asides found these distinctions to be of much significance.<sup>106</sup> Rather, the prevailing view seems to be that be-

104. Justice Powell declined to answer the question whether “a set-aside always will be an appropriate remedy” even where Congress is concerned, or whether “the selection of a set-aside by any other governmental body would be constitutional.” 448 U.S. at 515–16 n.14 (Powell, J., concurring).

105. *Id.*

106. Justice Powell’s opinion in *Bakke*, for example, placed stringent limitations upon the use of racial criteria by the state. He concluded that these requirements could not be met by the Regents of the University of California. Justice Powell held that the goal of “ameliorating, or eliminating where feasible, the disabling effects of identified discrimination” could serve as a compelling justification for using a racial criterion. 438 U.S. at 307. However, a program directed toward this end must be based, he added, upon “judicial, legislative, or administrative findings of constitutional or statutory violations.” *Id.* Finally, Justice Powell rejected the notion that all governmental entities could make constitutionally adequate findings of discrimination. “[I]solated segments of our vast governmental structures” were not competent, in his view, to make decisions about the existence and need to remedy discrimination “at least in the absence of legislative mandates and legislatively determined criteria.” *Id.* at 309. Because the Regents of the University of California were such an “isolated segment,” Justice Powell rejected the Regents’ argument that the Davis Medical School minority admissions plan was designed to remedy discrimination. *Id.* at 305–10.

The Brennan group (Justices Brennan, Marshall, White, and Blackmun) took the absolute position in *Bakke* that states have the power to remedy discrimination by employing racial criteria. According to their analysis, states can “voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 . . . validly may authorize or compel either the States or private persons to do.” *Id.* at 368. These Justices argued, further, that states have the competence to advance the fundamental purpose of equal opportunity to which the Fourteenth Amendment and the Civil Rights Acts are addressed. States’ actions that do not frustrate federal policy are constitutional in the absence of congressional preemption of the subject matter. Finally, the Brennan group noted in *Bakke* that states have been declared competent to act beyond the bounds of the Fourteenth Amendment (reaching private parties, for example) to eradicate discrimination. *Id.* at 368 n.44. Disagreeing with Justice Powell, the Brennan group took the position that the competence of state governmental entities should not be a matter of constitutional moment: “[T]he manner in which a State chooses to delegate governmental functions is for it to decide.” *Id.* at 366 n.42.

Most courts passing on set-asides have adopted the Brennan group’s analysis in *Bakke* that institutional competence is a matter of state law. *See, e.g.,* South Fla. Chapter of the Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade County, 723 F.2d 846, 852 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 220 (1984); Schmidt v. Oakland Unified School Dist., 662 F.2d 550, 558 (9th Cir. 1981); Arrington v. Associated Gen. Contractors, 403 So. 2d 893, 902 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982).

State law analysis of institutional competence has turned in many instances on the courts’ reading of relevant state bidding laws, which generally require that contracts be awarded to the “lowest responsible bidder.” Some courts have construed such provisions to prohibit considerations other than the amount of the bid and the minimum qualifications of the bidder in terms of financial ability and skills needed to complete the job successfully. *See, e.g.,* Arrington, 403 So. 2d 893, and Georgia Branch, Associated Gen. Contractors v. Atlanta, 253 Ga. 397, 321 S.E.2d 3125 (1984). Others have defined “responsible” to include concepts of social responsibility such as affirmative action. *See, e.g.,* Southwest Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County, 100 Wash. 2d 109, 115, 667 P.2d 1092, 1096 (1983).

Other courts have attempted to locate competence within the Constitution. *See, e.g.,* Ohio Contractors Ass’n v. Keip, 713 F.2d 167, 172 (6th Cir. 1983) (equal protection clause); Southwest Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County, 100 Wash. 2d 109, 121–22, 667 P.2d 1092, 1099 (1983) (state police power analogous to commerce power).

cause *Fullilove* upheld Congress' enactment of a minority set-aside without any contemporaneous legislative hearings, committee reports or debate justifying its action, other governmental entities may act in an equally summary manner.<sup>107</sup>

Hence, it is not surprising that most state and municipal set-asides have survived court challenges. In their treatment of set-asides, reviewing courts have been highly deferential to governmental claims that racial discrimination existed and that it warranted remedial steps. Relying upon *Fullilove*, courts have concluded, with respect to set-aside programs, that least restrictive means were not required, that the percentages of business set-aside for minorities or women were goals rather than impermissible quotas, that the percentages were reasonable in view of relevant population figures, and that the programs were sufficiently flexible to prevent illegal or unconstitutional treatment of non-minority or male-run business enterprises.<sup>108</sup>

Courts passing on the constitutionality of these programs have avoided

107. *Michigan Road Builders Ass'n, Inc. v. Milliken*, 571 F. Supp. 173 (E.D. Mich. 1983), exemplifies this mode of analysis. The court in *Milliken* stated that "the Legislature need not make specific findings of past discrimination . . ." *Id.* at 178 (citation omitted). The decision explains that because the Michigan legislature is the "ultimate policy-making body of the State and the nature of the decision-making process in the legislative setting is analogous to that of Congress, it may rely upon any evidence which logically supports the inference of prior discrimination." *Id.*

See also *South Fla. Chapter of the Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade County*, 552 F. Supp. 909, 914-16 (S.D. Fla. 1982) (series of studies conducted following May 1980 Liberty City civil disturbances, but no fact-finding hearings held by county commission), *modified*, 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 220 (1984); *Pierce County*, 667 P.2d at 1100 n.2 ("Local legislative bodies, which necessarily operate on a smaller and more informal scale, cannot be expected to undertake the expense of detailed recordkeeping comparable to that of Congress, which operates on a national scale.").

In contrast to the acceptance of more generalized evidence of discrimination in the cases discussed above, the court concluded in *Schmidt* that the findings required by Justice Powell's *Fullilove* opinion had been made by the Oakland School District, which conducted public hearings as well as numerous meetings with construction industry representatives. 662 F.2d at 558-59. *Accord* *Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco*, 619 F. Supp. 334, 340-41 (N.D. Cal. 1985).

The Alabama Supreme Court in *Arrington*, 403 So. 2d 893 (1981), took a stricter view of what is required in the way of findings, concluding that Birmingham's set-aside ordinance should be struck down because it was not "the considered response to hearings, reports, debates, or empirical studies." *Id.* at 902.

108. See, e.g., *Milliken*, 571 F. Supp. at 187-90 (burden on non-minority contractors was slight; appropriate safeguards concerning verification of minority enterprises, but no waiver or durational limit); *Metropolitan Dade County*, 723 F.2d at 853-54 (no overall percentage goal, waiver provisions, or durational limits; nonetheless, several-tiered approval process for set-aside held to be sufficient safeguard); *Keip*, 713 F.2d at 175 (no durational limit, but Ohio General Assembly, being "necessarily alert to the desires of a majority of the electorate," would not "permit the set-asides for minority contractors to continue beyond the time required to achieve the goal of an equal opportunity for minorities to share in the business of the state").

But see *Arrington*, 403 So. 2d at 903-04 (set-aside not narrowly drawn because minorities other than blacks were included; no time limit, written regulations or guidelines; no evidence adduced that 10% minority business enterprise set-aside had any relation to number of minority contractors available and equipped to do city construction work).



the crucial issues, namely the nature of the discrimination to be remedied, and the evidence upon which the finding of discrimination must be made. Having allowed the proponents of set-aside programs to offer only the most generalized evidence in support of the existence of discrimination, courts have hardly been in a position, thereafter, to question the constitutionality of the attendant percentages and implementation provisions.

## V. A PRINCIPLED APPROACH TO MINORITY SET-ASIDES

In view of this history of legislative and judicial inattention to the serious constitutional and public policy questions raised by the use of minority set-asides, one may ask whether there is any reason for allowing such programs to continue. Even if one accepts that congressionally mandated set-asides are not held to Justice Stevens' specific procedural and substantive criteria, is there any basis for granting states and localities similar authority? Unlike Congress, they are not explicitly authorized by section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions" of that amendment. Are not the risks to "values of permanent significance" increased dangerously by allowing lower levels of government to establish explicit racial classifications?

These are weighty concerns. There are, however, considerations on the other side of the balance that argue in favor of retaining minority set-asides as an option for governmental agencies in remedying the effects of racial discrimination in our society. For one, there is reason to believe that the effects of discrimination against minority and female business enterprises continue to limit the ability of these firms to compete effectively. Pervasive employment discrimination in the construction trades, for example, has prevented minorities from following the traditional path from laborer to entrepreneur.<sup>109</sup> If adoption of a set-aside program is preceded by a searching inquiry into the nature of discrimination and into remedial alternatives, and if the program is designed to alleviate a history of discriminatory disadvantage, I see no reason why this form of government action should be prohibited.

Additionally, with respect to state and local governments, we must be mindful that the federal government alone cannot be expected to eradicate racial discrimination in America.<sup>110</sup> Public institutions at all levels must

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109. See H. HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 235-47 (1977).

110. Commitment to civil rights enforcement at the federal level has varied from administration to administration. Even under the most committed leadership, however, resources have fallen far below the levels necessary to enforce federal civil rights laws effectively. Consequently, federal officials have viewed private enforcement as essential to the civil rights effort. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 708 n.42 (1979); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1086 n.2 (5th Cir. 1980) (federal agencies urge courts to find implied private rights of action in civil rights statutes

contribute to the effort. They are often in a better position to identify the effects of racial discrimination and to tailor corrective programs than is Congress. They should not be disqualified from this endeavor; rather, they should be required to proceed in a fashion that reduces the chances of irresponsible action to an acceptable minimum. Courts' efforts to compel such heightened accountability should focus on three factors that bear on the propriety of state and local set-aside programs: competence, findings, and means.

### A. *Competence*

It has been argued that some governmental institutions ought to be viewed as constitutionally incompetent to establish race-conscious programs because they are not equipped to identify and develop remedies for racial discrimination.<sup>111</sup> This is peculiar reasoning. The law already holds states, localities and their respective instrumentalities accountable for identifying and remedying their discriminatory practices.<sup>112</sup> If they are legally competent to stand trial, they should also be legally competent to take action that would obviate the necessity for a trial. This presumption ought to operate in the context of race-conscious remedial action.<sup>113</sup> Those states, municipalities, and governmental agencies such as school boards, that have already established set-asides, might best be regarded as having had competence to do so. Judicial inquiry into future programs ought to

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prohibiting sex discrimination in education and discrimination against disabled persons), *cert. denied*, 449 U.S. 889 (1980).

111. In *Fullilove*, Justices Stewart and Rehnquist took the position that even Congress was institutionally incompetent in this regard. *See supra* text accompanying note 74. In *Bakke*, however, Justice Powell took the more limited position discussed above, *see supra* note 106, that "isolated segments of our vast governmental structures are not competent to make those decisions [about the existence of and need to remedy discrimination], at least in the absence of legislative mandates and legislatively determined criteria." 438 U.S. at 309.

112. A school board, for example, bears a continuing duty to remedy unconstitutional racial segregation even in the absence of a judicial finding of violation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979).

Professor Tribe has provided a thoughtful analysis of what he calls the "structural concerns" about institutional competence voiced by Justice Powell in *Bakke*. Tribe questions whether those concerns "truly justified his decision to invalidate the Davis program." Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?* 92 HARV. L. REV. 864, 873-77 (1979); *see also* Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 DAYTON L. REV. 809, 817-24 (1983) (extended discussion of "structural review" and critique of Justice Powell's approach in *Bakke*).

113. One can conceive of a case in which the presumption fails. Take, for example, the way in which we treat courts of limited jurisdiction. Our judicial system often provides for trials *de novo* in the event that the initial court's decision is challenged, because we recognize that such proceedings are not necessarily presided over by legally-trained officers, that the hearings often lack the full panoply of procedural safeguards available at higher levels in the system, and that the courts operate on relatively meager budgets. *See Colten v. Kentucky*, 407 U.S. 104, 112-20 (1972). In the event that a government agency characterized by similar deficiencies established a set-aside plan, the presumption of competence would have to vanish.

focus on whether the governmental entity creating the set-aside is acting within its "sphere of authority."<sup>114</sup> Hence, a school board's decision to rectify the absence of minority contractors in its *own* public works program should raise no constitutional difficulties. Were a school board, however, to attempt to address problems facing minority contractors generally (at the national or state level, for example), it would raise questions about the board's competence to act with respect to matters outside its "sphere of authority."

In addition, the political sensitivity of set-asides has raised concern that they ought to be established only by elected, not appointed bodies.<sup>115</sup> This would ensure, in the first instance, that the programs were subject to proper public debate and consideration. Appointed bodies with authority to establish set-asides, however, are likely to be subject to the same public-meeting requirements applicable to elected agencies.<sup>116</sup> Although it might also be argued that programs established by elected bodies would receive greater public support because they were instituted by citizens' direct representatives, this assertion runs counter to the proposition that however responsibility is allocated between elected and appointed entities, all public officials are ultimately accountable to the electorate.<sup>117</sup> The fact that race-conscious programs are involved is no reason, in and of itself, to depart from this premise, particularly because the effect would almost certainly be to thwart governmental efforts to devise effective remedies for discrimination.

There is a final point to be made about institutional competence. The last decade has witnessed a significant increase in the number of black and other minorities holding elected office. Implementation of the Voting Rights Act of 1965 has spurred this change. Black mayors now serve in Philadelphia, Richmond, New Orleans, Newark, Atlanta, Chicago, and Los Angeles, to name only a few cities.<sup>118</sup> Both San Antonio and Denver

114. See, e.g., *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (judicial deference required to legislature acting within sphere of authority).

115. See, e.g., A. SINDLER, *EQUAL OPPORTUNITY: ON THE POLICY AND POLITICS OF COMPENSATORY MINORITY PREFERENCES* 16-20 (American Enterprise Institute Studies in Legal Policy, 1983) (advocating involvement of elected officials); Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 VA. L. REV. 1235 (1981) (urging greater judicial deference to affirmative action programs instituted by political bodies directly or indirectly responsible to public).

116. See S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 1079-80 (1979).

117. For a discussion of the various "countermajoritarian" forces that affect governmental action and the benefits that may flow therefrom, see Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 488-92 (1982); see also Tushnet, *supra* note 112, at 822-23. But see Chase, *The Left on Rights: An Introduction*, 62 TEX. L. REV. 1541 (1984) (thorough critique of traditional "representative-democracy" theories).

118. See P. EISINGER, *THE POLITICS OF DISPLACEMENT: RACIAL AND ETHNIC TRANSITION IN THREE AMERICAN CITIES* 147-68 (1980).

have Hispanic mayors. Many cities with minority mayors and a significant minority presence on their city councils have instituted race-conscious remedial programs such as set-asides.<sup>119</sup>

These developments have prompted at least two commentators to suggest that "courts must scrutinize somewhat more carefully those [affirmative action] programs instituted by decisionmakers of the minority race."<sup>120</sup> This suggestion rests on the view that less is at risk when race-conscious plans favoring minorities are instituted by governmental bodies controlled by whites. There is no reason to fear, the argument runs, that whites will discriminate against themselves, whereas minority officials may not exercise such self-restraint when adopting programs that disadvantage whites.<sup>121</sup> This logic elevates form over substance.<sup>122</sup> There is every reason to expect, in the absence of the safeguards which this Article advocates, that set-asides lacking remedial justification are just as likely to be instituted by white as by minority officials.

### B. Findings

As I have already discussed, the *Fullilove* majority settled for a very meager factual record, despite its demand that findings of discrimination justify the creation of set-asides. The same uncritical attitude is reflected in subsequent lower court opinions passing on state and local set-asides. Government agencies establishing set-asides should be held to a higher standard than at present, although they should not have to satisfy the procedural and evidentiary requirements demanded of courts or administrative tribunals engaged in resolving specific discrimination claims.<sup>123</sup> State and local agencies creating set-asides should, for example, be able to rely in part upon federal legislative or agency findings and judicial determinations regarding nationwide discrimination against minority business enterprises as predicates for considering the propriety of set-asides in their respective jurisdictions. But it is essential that state and local agencies also

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119. Atlanta, Birmingham, and Richmond are examples. See *supra* note 10.

120. Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 236 (1980); Note, *supra* note 115, at 1247 n.82.

121. Wright, *supra* note 120, at 236. Wright cites Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974), an influential discussion of this issue, as the starting point for his theory. Wright, *supra* note 120, at 234; see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1043-46 (1978).

122. A racial minority group may discriminate against its own members. *Castaneda v. Partida*, 430 U.S. 482 (1977) (petitioner allegedly discriminated against Mexican-Americans in empanelling grand jury). One segment of the white community may discriminate against another, less politically powerful segment of that same majority. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 168-79 (1977) (Brennan, J., concurring in part) (legislature allegedly diluted voting strength of white petitioners through redistricting).

123. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussion of burdens of proof in individual employment discrimination cases).

establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions, such as courts and administrative agencies.

Requiring that discrimination be identified is one thing; describing what remediable discrimination must look like is quite another. Without attempting to exhaust the universe, one can point to examples of what ought to be probative. Although statistics play a necessary role in the inquiry, significant disparities between the percentage of minority members among all contractors as compared with the general minority population in a state or municipality, standing alone, would not provide a sufficient basis for the implementation of a set-aside program. To be sure, courts have taken the position, in the employment context, that such disparities are probative of discrimination — at least when the minimal requirements necessary for employment support the presumption that the work force should be “more or less representative of the racial and ethnic composition of the population in the community” at large.<sup>124</sup> In cases where the jobs in question require qualifications not possessed by the general population, however, this presumption has not been entertained.<sup>125</sup> Because government contracting falls into this latter category, the relevant question is whether there is a significant disparity between the percentage of minority contractors eligible<sup>126</sup> to handle government contracts and their percentage representation among those actually bidding for or awarded such contracts.

Agencies should also consider the extent to which government contracting practices have been intentionally discriminatory. Were minority contractors systematically denied information about the existence of contracts upon which they could bid, about schedules associated with the bidding process, or about the availability of financial or technical assistance that would facilitate their participation? Have such contractors been denied contracts for which they were the lowest bidders consistent with applicable criteria? Intentional discrimination by non-minority contractors also is relevant. If, for example, government agencies find that prime or major contractors to whom they traditionally award contracts consistently refuse to hire minority subcontractors, reasonable grounds exist for acting to remedy that situation.

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124. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339–40 n.20 (1977).

125. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307–09 (1977) (relevant comparison in employment of public school teachers is between percentage of minorities on teaching staff and percentage in pool of qualified teachers).

126. “Eligible” minority business enterprises would have the minimum qualifications in terms of financial ability and skills needed to complete government contracts successfully, taking into consideration problems such firms may encounter in obtaining bonding and financing.

Intent, however, is not a necessary factor. Our experience under the modern civil rights statutes has taught us that institutions often engage in practices that, while not discriminatory in and of themselves, unnecessarily reinforce and perpetuate patterns of racial injustice.<sup>127</sup> This lesson should not be ignored in the context of public contracting. Governments should attempt to identify practices such as excessive bonding or experience requirements that have had discriminatory effects on minority contractors.<sup>128</sup> Evidence of such practices, too, may supply reasons for remedial action.

But what does it mean to say that there is evidence of discrimination against "minorities?" One of the major flaws in the set-aside upheld in *Fullilove*, one that subsequent federal, state and local programs have replicated, is that the record did not explain why six racial groups—"Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts"—were selected to receive the ten percent preference.<sup>129</sup> One can imagine that, had Congress given due deliberation to the subject, it might have concluded that at least four of these groups deserved to be included in the nationwide set-aside program. Certainly there is no need to recite the record of discriminatory practices nationwide directed against blacks, Hispanics, Asians and Indians in employment and business. There may well be sufficient evidence to conclude that Aleuts and Eskimos have experienced similar treatment in areas where they live in large numbers. But it requires far more to justify the inclusion of all or most of these groups in any state or local government set-aside program. Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past or present discrimination.<sup>130</sup> Similar questions arise over the inclusion of women's business enterprises in set-aside pro-

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127. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) (discriminatory impact of employment tests upon blacks resulting, in part, from inferior education they received in segregated public schools violates Title VII absent business necessity). Likewise, Justice O'Connor's concurring opinion in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1856 (1986), views statistical evidence of discrimination as a "reliable benchmark" in determining whether race-conscious remedies are appropriate. The Supreme Court has recently reaffirmed its acceptance of statistical proof of discrimination. See *Bazemore v. Friday*, 106 S. Ct. 3000, 3007-11 (1986) (upholding multiple regression analyses).

128. See R. GLOVER, *MINORITY ENTERPRISE IN CONSTRUCTION* 57-61 (1977) (bonding requirements may bar minority businesses from large contracts); INTERAGENCY TASK FORCE ON WOMEN BUSINESS OWNERS, *THE BOTTOM LINE: UNEQUAL ENTERPRISE IN AMERICA* 89-96 (1978) (regulatory barriers facing women business owners); U.S. COMMISSION ON CIVIL RIGHTS, *MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS* 16-28 (May 1975) (obstacles facing minority and female-owned firms in government contracting).

129. Indeed, neither Congress nor the Court could explain how "Spanish-speaking" could be regarded as a racial or ethnic group. Justices Stewart and Stevens found the inclusion of these six groups in the Public Works Employment Act to be a serious constitutional flaw. *Fullilove*, 448 U.S. at 530 n.12 (Stewart, J., dissenting); *id.* at 537-39 (Stevens, J., dissenting).

130. For example, Richmond, Virginia's set-aside program includes these six groups. See *supra* note 10.

grams.<sup>131</sup> Of course, women have also been the victims of pervasive discrimination in our society.<sup>132</sup> Although women may have made significant strides in gaining access to employment and the professions, they continue to confront the effects of discrimination, both past and present, in establishing and operating business enterprises.<sup>133</sup> Nevertheless, initiators of set-aside programs should have the burden of demonstrating a nexus between their findings of past and present discrimination and the groups that are to be afforded and denied preferences under such programs.<sup>134</sup>

### C. *Means*

Inquiries into evidence of discrimination of the type just described may reveal that, at least in some jurisdictions, there is no basis for a finding of past discrimination, or that the effects of discrimination have disappeared with the passage of time or through other intervening events. But where discrimination that warrants remedial action is found, the question of the appropriate means cannot be avoided. I can see no good reason to require government agencies in this position to experiment with remedies that do not involve explicit racial classifications if these remedies offer no likelihood of success. Agencies should, however, demonstrate that these lesser alternatives were systematically and thoroughly explored prior to being rejected. This exploration may take many forms, including evaluation of relevant literature, consultation with experts, and assessment of the extent to which similarly-situated government agencies have found the alternatives effective.

If this review leads the agency to conclude that a minority set-aside promises to be the most effective solution, the agency must then determine the percentage size of the set-aside and the duration of the program. For reasons already discussed, setting the percentages for the program at general minority population levels cannot easily be defended as a remedial

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131. See *Michigan Road Builders Ass'n v. Milliken*, 571 F. Supp. 173 (E.D. Mich. 1983) (affirming race- and sex-based set-asides); *Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wash. 2d 109, 667 P.2d 1092 (1983) (en banc) (upholding county's race- and sex-based set-asides); see also *supra* notes 89-96 and accompanying text (discussing Department of Transportation set-aside regulations).

132. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973) (discussing history of discrimination against women).

133. See INTERAGENCY TASK FORCE ON WOMEN BUSINESS OWNERS, *supra* note 128, at 4, 23-25, 41-42, 89-95; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 128, at 16-28.

134. It must be kept in mind that whatever the percentage of work set aside for minorities and women by such programs, the amount is finite. Hence, those entitled to participate are in competition with each other. Without an inquiry into the degree to which various minority groups and women have been the victims of discriminatory barriers to participation in government contracting, governmental bodies unfairly oblige those that have suffered most in certain jurisdictions to compete for the limited opportunities provided by set-asides with others less affected by discrimination.

measure.<sup>135</sup> Rather, the levels should initially correspond to the percentage of minority contractors within the jurisdiction who are qualified and available to participate in government projects. These percentages might then be increased, if findings of discrimination support it, to reflect the number of minority entrepreneurs who were deterred in the past from entering the contracting business because of racial barriers, but who are likely to take advantage of the remedial program.<sup>136</sup> In any event, the program should contain explicit provisions for waiver of the specified percentages in cases where it can be established that they are unattainable or unrealistic despite best efforts.

There is no magic time period for the duration of set-aside programs. As in the case of percentages, the proper number should flow from the nature of the discrimination to be remedied. Two observations merit emphasis. First, any new program needs a reasonable period in operation before its effectiveness can be assessed realistically.<sup>137</sup> Second, whatever the duration initially selected, the program ought to be subject to continual monitoring and to a comprehensive review at a specified time, according to pre-established procedures, before it is renewed or extended. This review should parallel the inquiry undertaken prior to the program's adoption.

## VI. CONCLUSION

I have offered a general approach to the development of minority set-asides. It is not an easy one, nor is it meant to be. I recognize that adherence to these criteria may require major changes in the way governments go about remedying discrimination against minority business enterprises. Some government agencies may find themselves unable to conduct the necessary inquiries upon which to predicate a set-aside program. Others may conclude that there is no identifiable discrimination to be remedied or that there are preferable alternatives to reliance upon explicit racial criteria. Still others may conclude that their set-aside programs ought to favor

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135. See *supra* text accompanying notes 124-26. Indeed, a federal Court of Appeals recently held a city set-aside ordinance unconstitutional because general minority population figures, rather than ones related to the percentage of qualified minority businesses, were used to determine the size of the set-aside. *J. Edinger & Son, Inc. v. City of Louisville*, No. 85-6057 (6th Cir. Oct. 1, 1986).

136. The depressive effect of discrimination on the incentives of racial minorities and women to participate in employment and government programs has been judicially recognized. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (employment); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 163-64 (1977) (voting).

137. As one court said in holding that a school district would have to operate its school desegregation plan for longer than one semester before any determination could be made about whether constitutional requirements were met: "One swallow does not make a spring." *Lemon v. Bossier Parish School Bd.*, 444 F.2d 1400, 1401 (5th Cir. 1971) (per curiam). This attitude should inform any evaluation of a set-aside program's effectiveness.



fewer groups, at lower percentages, for shorter periods than is the current practice. My sense is that all of these outcomes ought to be encouraged because they would bring an integrity to the entire undertaking that is badly needed. I hope this will occur.

It is difficult to criticize the efforts of people of goodwill seeking to rid our society of its unfortunate legacy of racial discrimination. I would be the first to argue that minority business set-asides have been proposed, adopted and judicially sanctioned by people acting out of the very best of motives. But more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system. It must be shown that such a system is responsive to findings of racial discrimination, is designed to redress that problem, and is employed only as long as is necessary to achieve its remedial objective. These standards were not met by the Public Works Employment Act of 1977. They were not demanded of Congress by the Supreme Court which upheld the Act in *Fullilove*, and they have not characterized subsequent set-aside programs at any level of government. This is an indefensible state of affairs that threatens to undermine the principle of affirmative action and the appropriate use of explicit race-conscious remedies for racial discrimination.<sup>138</sup> It ought to stop.

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138. Although this Article has focused on minority enterprise set-aside programs, the failings discussed in that area find current counterparts in other types of voluntary affirmative action programs. The minority layoff provision recently pronounced unconstitutional in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), is a case in point. The school board and two lower federal courts were insufficiently mindful of the need to link a program designed to ensure proportional layoff of teachers by race, irrespective of seniority, to evidence of past discrimination, and to tailor its provisions to remedy that condition. This result is unfortunate because the board probably could have developed a properly tailored plan that would have survived constitutional attack. *Id.* at 1863 (Marshall, J., dissenting). Moreover, the school board's inattention to detail probably robbed its efforts of the broad public support that such programs require to be successful. In this and other areas of voluntary race-conscious affirmative action, the prescriptions that I have offered with respect to set-asides are equally applicable.